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Nos. 11,694 and 11,693

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. SCIENTIFIC NUTRITION CORPORATION, d/b/a Capolino Packing Corporation, *Respondent,* and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AFL., and CALIFORNIA STATE COUNCIL OF CANNERY UNIONS, AFL, *Intervenors.*	No. 11,694
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RESPONDENTS' SUPPLEMENTAL BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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RESPONDENTS' SUPPLEMENTAL BRIEF.

In accordance with the order of the Court of December 15, 1949, this brief is filed to discuss the effect of the decision of the Supreme Court in *Colgate-Palmolive-Peet v. Labor Board,* 94 Law. ed. Adv. Op. 127. Inasmuch as another memorandum is being filed on this subject in *NLRB v. Flotill Products, Inc.,* No. 11,449, this brief will apply to the Hume and Scientific Nutrition cases above captioned.

THE SCIENTIFIC NUTRITION CASE.

As has been noted in briefs already on file, the Scientific Nutrition case took a strange turn as it made its way through the Board's procedures. The Board's complaint (Tr. 8-9) attacked the discharge of Gus Cedar solely upon the ground that the contract requiring membership in the Teamsters Union as a condition of employment had been secured by unlawful aid and assistance given to the union and was therefore invalid.

As we have pointed out in our earlier brief (Respondent's Brief case 11694, pp. 6-12) the Board concedes that the Teamsters succeeded to the contract which covered respondent's employees in May, 1945, and whatever the Teamsters did in the plant after their successorship they did in compliance with the plain provisions of that contract. As we also pointed out, the parties believed that they had a union shop contract.

By the time the case reached the Board, however, it was disposed of on the theory that the collective bargaining agreement to which the Teamsters succeeded was not a closed shop contract. (Board's Brief case 11694, p. 2.) The Board gratuitously rewrote the agreement of the parties, omitting the membership obligation.

Basically we feel that this case is one of simple contract law. The function of the Board was to determine what the total collective bargaining agreement was when the Teamsters Union succeeded to it, and whether the acts of employer and union thereafter were within the provisions of that contract. The Board did not charge, nor does it now claim, that the Green Book contract was adopted as the result of an unfair labor practice, or that the union membership requirement was established as the result of an unfair labor practice. What the Board does is to ignore the union membership requirement, which stands uncontradicted in the record, and thereby effect an administrative amendment of the collective bargaining agreement.

To the extent that the *Colgate* case obligates the Board to stay within the bounds fixed by the statute which created the Board that case is very much in point here. As the Supreme Court said, for example (94 Law. ed. Adv. Op. 132):

> "The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and spirit of the statute and reform it to conform to the Board's idea of correct policy."

And again (idem, pp. 132-133):

> "It is quite reasonable to suppose that Congress thought it conducive to stability of labor relations that parties be required to live up to a valid closed shop contract made voluntarily with the recognized bargaining representative, regardless of internal disruptions growing out of agitation for a change in bargaining representative. In the instant case the employees exercised their right to choose their bargaining representative. The representative bound them to a valid contract. The contract was lived under for four years and was subsisting at the period of time in question. It was made and carried out in good faith by petitioner, who cannot be held guilty of an unfair labor practice by administrative amendment of the statute."

No more so can respondent be held guilty of an unfair labor practice by an administrative amendment of a contract.

THE HUME CASE.

The Hume case presents two issues, both somewhat different than that in Scientific Nutrition. The first issue is a matter of contract interpretation under the Green Book agreement. As we stated in our earlier Hume brief (Respondent's Brief, case 11693, p. 3), if dismissals were made in response to an obligation created by that contract they are not an unfair labor practice under section 8(3) of the Act, and the order for reinstatement and back pay would fall.

The Teamsters Union throughout this proceeding has consistently argued that the Green Book contract required union membership as a condition of employment. The Board's contrary conclusion may well have been prompted by its reluctance to recognize closed shop or union shop contracts except under the most compelling circumstances, and its desire to restrict their application as far as possible. The Supreme Court recognized the Congressional approval of the closed shop and its effect on the bargaining relationship, in the *Colgate* case. (94 Law. ed. Adv. Op. 132.)

> "One of the oldest techniques in the art of collective bargaining is the closed shop. It protects the integrity of the union and provides stability to labor relations. To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act. Congress knew that a closed shop would interfere with freedom of employees to organize in another union and would, if used, lead inevitably to discrimination in tenure of employment. Nevertheless, with full realization that there was a limitation by the proviso of Par. 8 (3) upon the freedom of Par. 7, Congress inserted the proviso of Par. 8(3). It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute."

In the Hume case the Trial Examiner and the Board found that "the discharges were brought tbout through coercion of Hume by AFL." (Tr. p. 89.) The Board argues that threatened economic hardship may not excuse an employer from the consequences

of an unfair labor practice. (Board's Brief, case 11693, p. 37, note 32.) But, as the Court pointed out in the *Colgate* case, "this is a contest primarily between labor unions for control." (94 Law. ed. Adv. Op. 132.)

> "In reality whatever interference or discrimination was present here came not from the employer, but from fellow-employees of the dischargees. Shorn of embellishment, the Board's policy makes interference and discrimination by fellow-employees an unfair labor practice of the employer. Yet the legislative history conclusively shows that Congress, by rejecting the proposed Tydings amendment to the Act, refused to word Par. 7 so as to hamper coercion of employees by fellow-employees." (Footnote 16.)
>
> (Footnote 16). "During consideration of the bill on the Senate floor, Senator Tydings proposed to amend it by adding to Par. 7 the words 'free from coercion or intimidation from any source.' In the debate which followed it became clear that the amendment would deal with employee-against-employee relations, while the bill was designed to deal only with employee-employer relations, and the amendment was defeated. See 79 Cong. Rec. 7653-7658, 7675."

The Court's admonition that it is not for the Board to make law may warrant a reexamination of the principle of *NLRB v. Star Publishing Co.*, 97 F. (2d) 465, at least insofar as it applies to the rather unusual circumstances of this case.

In short, if on contract principles the Green Book required the discharge of Hume's non-member em-

ployees the AFL was right in maintaining its position and on the authority of the *Colgate* case the Board cannot adopt a different interpretation of the agreement merely to further its now outlawed policy against the enforcement of valid closed shop agreements.

The second issue relates to the validity of a memorandum executed on March 25, 1946, requiring continuous membership in the AFL as a condition of employment. The Board concluded that the memorandum was invalid, not because of any of the matters relating to the discharges, but solely because a representation proceeding was still unresolved by the Board—in other words, because of the Midwest Piping Doctrine.

Much of our argument about the effect of the *Colgate* case on the Midwest Piping doctrine is covered by our Supplemental Brief filed in the *Flotill* case, and rather than repeat it here we are accompanying this memorandum with a copy of the Flotill argument. Additionally, however, we submit that the union membership requirement is valid even though (as distinguished from Flotill) it may have added a condition not previously established by collective bargaining.

The proviso to section 8(3) of the Act (49 Stat. 449, sec. 8(3)) reads in part as follows:

> "Provided, That nothing * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as

> an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a) in the appropriate collective bargaining unit covered by such agreement when made."

The Board did not find that the Teamsters Union was unlawfully established, maintained or assisted by any unfair labor practice other than by reason of the application of its Midwest Piping doctrine. Nor did the Board find, that the AFL did not in fact represent an uncoerced majority on March 25, 1946, when the union membership memorandum was executed. Absent such findings we submit that the Board has failed to meet its burden of proof. It is not entitled to a presumption of invalidity merely because of the challenge of an outside union. The employer may have acted at his peril in dealing with the AFL as majority representative, but until the Board demonstrates affirmatively that the asserted majority was fictitious the March memorandum stands as a collective bargaining agreement which was enforceable in terms of the declared policy of Congress.

CONCLUSION.

For the reasons above stated we submit that the Colgate decision is the inescapable consequence of authorities such as *Consolidated Edison v. NLRB,* 305 U.S. 197, and others cited in our briefs, holding that the Board is without power to issue orders such

as those here before the Court. We shall be pleased to present further oral argument if the Court desires.

Dated, Oakland, California,
January 13, 1950.

Respectfully submitted,
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